SUPREME COURT, U.S.
FILED
MAR 15 1972
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-816

DUN & BRADSTREET, INC., a Delaware corporation,
Petitioner,

v.

KANSAS ELECTRIC SUPPLY COMPANY, INC.,
a Kansas corporation, *Respondent.*

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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March 15, 1972

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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REPLY BRIEF

Respondent's Brief in Opposition does not and cannot obscure the single, vital question here presented: Does the First Amendment as construed by *New York Times* v. *Sullivan*, 376 U.S. 254, 84 S.Ct. 710 (1964) and subsequent decisions of this Court apply to the publication of corporate credit reports?

The Tenth Circuit and the trial court explicitly held that "the rule of *New York Times* does not govern the instant controversy". Court of Appeals Opinion, Appendix A to Petition, p. 11a. They then proceeded to apply the Kansas law of libel which is materially and fundamentally at variance with the *New York Times* standards. In net effect and as applied in this case, the Kansas law of libel is indistinguishable from the

Pennsylvania libel law which this Court in *Rosenbloom v. Metromedia, Inc.* held to be in conflict with First Amendment requirements as implemented by *New York Times*, 403 U.S. 29, 91 S.Ct. 1811, 1816 *ff.* (1971). Both, under the shibboleth of "actual malice," invite the assessment of general and punitive damages for simple error and without proving that specific damages resulted from the publication of the erroneous report.

I. The Importance of the Question

Respondent's statement that "there is no generally important question to the American public to be determined herein" is patently unfounded. We are aware of at least fifty cases pending in various courts of the land which present precisely the same issues as the present case. There are undoubtedly many more.

The question, even narrowly considered with respect to corporate credit reporting, is of great importance to the public and to the Nation's economy. The type of information involved is of general public interest. It is usually reported by specialized publishers, but the importance of public access to it is attested by the fact that such information is also published in newspapers like the New York Times.

The principles at stake are also applicable to a vast variety of specialized publications, such as medical bulletins issued to doctor-subscribers; consumer reports on products, mailed only to subscribers; political "insider" letters, etc.

II. The Applicability of New York Times v. Sullivan

Respondent makes the strange argument that because no bankruptcy petition had in fact been filed against respondent, the report that such a petition had been

filed cannot be a statement of "general or public interest" within *Rosenbloom, supra*, 403 U.S. 29, 43, 91 S.Ct. 1811, 1818. This is obviously an argument without point or substance. *Cf. Ocala Star-Banner* v. *Damron*, 401 U.S. 295, 91 S.Ct. 628 (1971). Opposition, p. 10. It would mean that for a statement to be of "general or public interest", it must be true – i.e., non-libelous – in order to be protected by the First Amendment.

Under this Court's decisions, there is no longer room for doubt as to whether *New York Times* applies to the publication of commercial information. See Petition, pp. 11 et seq., and statements of this Court cited therein. A privately owned corporation engaged in public business, seeking the trust and patronage of the public, certainly exposes itself to the free and uninhibited circulation of information as to whether that trust should be given. See Petition, pp. 16 et seq.

Even if the publication were confined to subscribers, who presumably include persons and companies most acutely concerned, the publication is entitled to protection of the First Amendment as implemented by *New York Times*. (*Cf.* a medical journal reporting to subscribing doctors that a drug is dangerous. Petition, pp. 19 et seq.). Actually, respondent's complaint is that the accused report was in fact "widely circulated" (Opposition, p. 7), and certainly the jury's assessment of damages ($100,000 general and $50,000 punitive) must have been based on this premise.

III. The Impact of New York Times v. Sullivan

Respondent's Opposition does not state that the standard of *New York Times, supra*, was applied. It could hardly do so in view of the explicit disavowal by

circumscribe the meaning and substance of this Court's exposition of the First Amendment.

The courts below did not pretend to apply this Court's standard. The instructions given the jury did not, and did not pretend to, adhere to the *New York Times* requirements. It is idle to attempt to obscure these basic facts. Cf. *Rosenbloom* v. *Metromedia, Inc.*, *supra*. In fact, as in *Rosenbloom*, the instructions given to the jury under the state libel law were a boilerplate which in substance instructed and invited the jury to find liability for plaintiff's injury and to assess actual and punitive damages without the restraints of the "finer, more discriminating instruments of regulation" that, as a minimum, the First Amendment requires with respect to publications of matters of general interest.

IV. The Damage Question

Respondent does not directly argue that the judgment below can be supported by reference to any evidence of damage specifically attributable to the accused report (Opposition, pp. 11-13). Contrary to a totally unsupportable statement in the Opposition (p. 13), we reaffirm that there is not in the record a single instance of contractual credit, loss of customers or loss of business because of the erroneous report. It would be surprising if there were such evidence in view of the immediate correction of the report (cf. Douglas J., dissenting from denial of certiorari, *Dun & Bradstreet, Inc.* v. *Greenmoss Builders*, 105 S. Ct. 2741, 2743 (1985)). The evidence in the record is precisely to the contrary and

The quote is from Justice Harlan's dissenting opinion in

the jury specifically found "no special damages".[3] (Petition, pp. 9, 23). "Special damages" as distinguished from "general damages" were defined in the instruction (No. 18, Appendix B, p. 18a) as "compensatory damages" which naturally, but not necessarily, flow from the wrongful act, such as loss of customers, loss of profits, diminution of trade, and such future business losses as can be shown with reasonable certainty".

These are exactly the type of damages which, according to the statements of members of this Court, are the *only* types for which damages should be awarded. See *infra*).

The fact is that the case was brought as "libel *per se*" (Opposition, p. 3). The jury was instructed that "damages arise *by inference of law* and are not required to be proved by a showing of specific harm since the law presumes such damages . . ." (Instruction No. 18). Punitive damages, the jury was instructed, are to be ganged "as punishment and as a warning to others against similar conduct". (Instruction No. 20).

It is our submission, on the basis of statements by this Court and various of its members, that the treatment of the damage question in this case presents im-

[3] At trial numerous representatives of manufacturers who sell to Kansas Electric testified uniformly that the Dun & Bradstreet publication did not result in the curtailment of credit to Kansas Electric. No evidence was introduced which would tend to indicate that any customer of Kansas Electric stopped buying from Kansas Electric because of the notice.

The record shows that Kansas Electric's decline in business began before the publication of the Dun & Bradstreet report. The record amplifies the proof of deteriorating business by evidence showing that Kansas Electric's salesmen complained to management of lost sales because of slow deliveries and non-competitive prices.

portant issues which are ripe for decision. These issues are apart from and in addition to the general question of the applicability and application of the standards of *New York Times* as to liability. The issues are as follows:

1. Where there is no evidence of loss or harm specifically following from the accused statement, may liability be imposed?

2. Absent evidence of damage specifically resulting from the publication, may "general damages" be assessed?

3. May punitive damages be imposed?

These are questions of the utmost importance. *Cf.* statements by individual Justices in *Rosenbloom* v. *Metromedia, Inc., supra:* White, J., 91 S.Ct. 1827; Harlan, Jr., 91 S.Ct. 1829, 1836: "I would hold unconstitutional in a private libel case, jury authority to award punitive damages which is unconfined by the requirement that these awards bear a reasonable and purposeful relationship to the actual harm done"; Marshall, J., with Stewart, J., concurring, 91 S.Ct. 1836, 1840 and *passim:* "I believe that appropriate resolution of the clash of societal values here is to restrict damages to actual losses".

Respectfully submitted,

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